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In The
Supreme Court of the United States

OCTOBER TERM, 1970

NO. ~~1700~~ 70-163

CHARLES E. VARNER,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Charles E. Varner, prays that a writ of certiorari be issued to review the judgment of The United States Court of Appeals for the Fifth Circuit, entered January 28, 1971, affirming the judgment and sentence of the District Court for the Middle District of Florida.

Reference to Opinions Below

The District Court rendered no opinion. The opinion of the Court of Appeals for the Fifth Circuit, entered January 28, 1971 (App. 2),* is reported at 437 F.2d 1195. That

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*The reference (App. —) refers to the appendix herein and the reference (R. —) refers to the record on appeal.

Court's opinion on petition for rehearing, entered April 12, 1971 (App. 9), is as yet unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on January 28, 1971 (App. 13). Rehearing was denied on April 12, 1971 (App. 9). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented for Review

1. In a mail fraud prosecution for depositing and mailing false and fraudulent bank drafts, does an indictment not charging wherein the drafts or their deposit was false or fraudulent meet Sixth Amendment standards?

2. Has an accused waived any right he may have to an indictment informing him wherein his allegedly fraudulent deposits were fraudulent when his privately employed counsel does not attack the indictment prior to trial and first questions its sufficiency at trial?

3. In proceedings on a mail fraud indictment not charging wherein the accused's fraudulent deposits were fraudulent, is due process accorded the accused by a trial court which rests its conviction on one view of the fraudulence and by an appellate court which rests its affirmance on another view of the fraudulence and its denial of rehearing on still another view of the fraudulence?

Constitutional Provisions Involved

This case involves the Fifth and Sixth Amendments to the United States Constitution, which provide in part:

> "No person shall be deprived of life, liberty, or property, without due process of law . . . . "
>
> United States Constitution, Amendment V.

> "In all criminal prosecution, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . . "
>
> United States Constitution, Amendment VI.

Statement of the Case

Petitioner was convicted in the District Court on an indictment which charged in each of five counts that he

> ". . . devised and intended to devise a scheme and artifice to defraud the Bank of South Brevard, Melbourne, Florida, and to obtain money therefrom by means of the following false and fraudulent pretenses and representations well knowing at the time that the pretenses and representations were false when made:
>
> "Charles E. Varner did knowingly and wilfully submit to the Bank of South Brevard, Melbourne, Florida, false and fraudulent bank drafts as deposits to an account maintained by him at said bank entitled Coleman's Airport Village Inn, Account No. 09-0-001-3.
>
> "The defendant, Charles E. Varner, was on the Board of Directors of the bank at the time each bank

> draft was submitted and on each occasion of the submission of the false and fraudulent drafts the aforementioned bank account was in an overdrawn status. As a result of the submission the aforesaid account was credited with the particular amount and was brought into a current status."
>
> (App. 3-4.)

Each count charged further that, on a certain date, the defendant, "for the purpose of executing the aforesaid scheme and artifice and attempting to do so" and with "unlawful intent," caused a specified "bank draft" "to be placed in an authorized depository for mail." (App. 4.) These "bank drafts" were alleged to have been drawn on various banks in the amounts of $5,000.00, $5,200.00, $16,000.00, $36,000.00, and $36,000.00.

The indictment did not inform the accused of wherein the "bank drafts" were false or fraudulent or wherein the deposit of them was false or fraudulent. Prior to trial defense counsel moved the Court unsuccessfully to dismiss the indictment, but not on the ground that it failed to state an offense with such particularity as to inform the accused of the nature of cause against him.

At the close of the Government's case and in considering the defendant's motion for judgment of acquittal, the trial court itself initially raised the question of whether the indictment sufficiently informed the defendant of the accusation against him. The court stated:

> "Well, the indictment doesn't just charge a scheme. In fact it says there was a scheme device or an arti-

> fice to defraud devised, but it doesn't go ahead and state what it is. . . .
>
> "This is another example of what I think from the bench I have criticized a number of times in the drafting of indictments of throwing in the whole statute instead of charging just exactly what it is that the Government charges a person with . . . . "
>
> (R. 439-40).

The trial court receded from the position indicated by these remarks, though supported in them by defense counsel. The first paper filed by defense counsel attacking the indictment was his motion in arrest of judgment.

None of the instruments introduced in evidence by the Government was a bank draft,* as stated in the indictment. Three were customer's drafts by which the defendant called on a named individual or a named bank to remit certain funds without describing any particular "account" or other source of the funds. Two of the instruments, though in the form of ordinary checks, were also referred to in the interrogation of witnesses and in their testimony as "drafts" (R. 353-54).

The prosecutor in adducing evidence uniformly treated Varner's deposit of the instruments in the Bank of South Brevard as representing or implying the existence of certain

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*A bank draft is a "check drawn by one bank upon another." 10 Am.Jur. 2d, *Banks* §545 at 519; *Cochrane* v. *Florida East Coast Ry. Co.* (1932), 107 Fla. 431, 145 So. 217, 219.

checking accounts in distant banks in which there were funds sufficient to cover payment upon arrival. And so the prosecutor's position throughout the trial was that Varner's deposit of the "bank drafts" was fraudulent because Varner knew they were drawn on "non-existent accounts" or on checking accounts with insufficient funds.

The prosecutor told the jury in opening that "there was in fact no account" (R. 140). In respect to the Count One draft, he proved that an officer looked for "the account of the maker" and couldn't find one, "opened or closed" (R. 255). In respect to the Count Two draft, he proved that the drawee Bowling had an "account" (R. 270) but "did not have sufficient funds to cover it", (R. 274) in "the account" (R. 275) and hadn't given the bank "authority to pay the *check* on his account" (R. 274, emphasis added). The prosecutor produced Bowling himself as a witness, but asked him only whether he had "sufficient funds in your account to cover that draft" (R. 282), whether he knew Varner "was going to make a draw against your account" (R. 283), whether the draft was "charged against your account" (R. 283), and he requested that Bowling explain, over an objection that was overruled, "why you permitted Mr. Varner to make a draw against your account" (R. 286).

In respect to Counts Three, Four and Five, the repetition continued: no account (R. 295), "returned for reason no account found" (R. 307), "non-existent account," no account, "not having an account" (R. 316), no account (R. 340, 341), no account (R. 353), "non-existent account" (R. 354).

The prosecutor stressed the theme on final argument that "they were drawn on banks where there was non-existent account" (R. 559), that Varner "was making a draw against that account" (R. 559), that "there was not an account in

existence upon which any of those four drafts could have been charged (R. 560), that "he drew these drafts upon a bank where there was no account" and "if somebody draws a draft on a bank where there is no account, he does it willfully" (R. 560), that "there was not an account in existence," that "there was no account up there -- there was no account whatsoever" (R. 589).

The trial court charged the jury that an essential element of each offense was that Varner knew the drafts "would not be honored when submitted to the *account upon which they were drawn*" (R. 630, emphasis added).

Opposing Varner's post-trial motions, the prosecutor continued: "no account" and "no account" and "didn't have an account" and "there hadn't been an account" (R. 126); "no account" and "not having an account" (R. 127). Defending the appeal, the Government argued that the drafts were "drawn on purported accounts" (appellee's brief, p. 3) or "non-existent bank accounts" (appellee's brief, p. 9).

The possible fraudulence of the instruments in question depended on what they purported to be. No one except the grand jury regarded them as false or fraudulent bank drafts. The prosecutor regarded them as checks, and so fraudulent because drawn on non-existent accounts. Varner insisted that all were customer's drafts, submitted in good faith by him to demand payment from the drawee, from whatever source the drawee might deem appropriate.

In proof of Count Three, involving an unambiguous customer's draft, the prosecutor brought the drawee from Virginia to Florida to ask him "did you have an account" at the bank, to ask "Did you ever have an account," to ask "why such a draft would have been charged against a non-existent

account there" and to ask whether he authorized Varner to "draw against an account that you didn't have at that bank" (R. 316-17). When on cross-examination Varner's counsel attempted to show Varner's business dealings with Ricks which Varner said resulted in Varner's submission of the draft (R. 521), the Court cut off interrogation on the ground that "this is going way beyond the direct examination" (R. 318, 320, 324).

The trial court convicted the accused for depositing instruments which he knew "would not be honored when submitted to the account upon which they were drawn" (court's charge to the jury, R. 630).

In upholding the conviction, the Court of Appeals in its first opinion unambiguously regarded the instruments in question as "drafts" and regarded the fraudulence issue as whether Varner knew and intended, when depositing the instruments, that the drawees would not honor the drafts when presented. Thus, the Court stated:

> "Although it may have been much clearer to the casual reader had the indictment included the language to the effect that when Varner deposited these drafts he knew they were worthless and did not intend that they would ever be honored by the drawee, we think this language was not necessary in light of the fact that the indictment referred to them as 'false and fraudulent bank drafts as deposits to an account maintained by him.' Proof of the falsity and fraudulent nature of the drafts could be supplied by the fact that none of them was ever paid and the jury could infer from the testimony on the trial that Varner knew at the time he made the deposit that they were never expected to be paid."
>
> (App. 5.)

Chief Judge Brown, concurring in the affirmance because he considered that the vagueness of the indictment was acquiesced in and waived by appellant, wrote:

> "With the transactions occurring in states as far off as California the trial itself revealed the impossibility of obtaining during the trial rebuttal witnesses on crucial points. Indeed the record shows that the Government's theory shifted from time to time and it was not until the jury verdict (or maybe on argument before us) that it jelled."
>
> (App. 7-8.)

Chief Judge Brown's reference in his January 28, 1971, opinion to the prosecution theory having finally "jelled" was premature. In its April 12 opinion denying rehearing, the Court of Appeals, with the Chief Judge apparently concurring, characterized one or two of the instruments in question as "ordinary customers' checks," and so, as to those instruments, reverted to the prosecutor's trial theory, unstated by the grand jury, that the instruments were fraudulently drawn on non-existing checking accounts. (A. 11-12.)

Reasons for Granting the Writ

The Court of Appeals has decided substantial questions of federal constitutional law in a way in conflict with applicable decisions of this Court and in a way requiring exercise of this Court's supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts.

Here, because the indictment entirely mischaracterized the instruments which allegedly were false or fraudulent and entirely omitted to state wherein they were false or their

deposit fraudulent, the prosecutor was free to frame the main issue in the trial court as it pleased him to frame it, even to the point of preventing Varner's counsel from cross-examining a critical prosecution witness on matters pertinent to defense counsel's notion of what the charge was, but "beyond the scope of direct examination" on the narrow issue posed by the prosecutor.

Because of the same latitude of interpretation inherent in the vagueness of the indictment, the Court of Appeals affirmed the conviction on a different notion of what the charge was, which coincidentally was the same interpretation that defense counsel sought unsuccessfully to pursue on cross-examination of that same witness.

And then, because of the same infirmity in the indictment, the Court of Appeals denied rehearing on still another reinterpretation of the indictment in light of the subsequent evidence, this particular restatement being a blend of the prosecutor's theory at trial and the Court's original theory on appeal.

These divergencies in interpreting the indictment are not merely possible or plausible; in this case they were actual, and the agencies of the Government freely selected from them, at three distinct stages of this case, the interpretation which Varner was then most disadvantaged to combat.

And the Court of Appeals held that any persistent vagueness in the indictment was harmless because, some weeks before the trial, Varner's counsel "obtained documents that made it clear to him what transactions were actually to be dealt with" and "understood the nature of the prosecution" (App. 5, 10). Trial counsel's grasp of what the grand jury intended to charge was supposedly evidenced by his acquies-

cence in the trial judge's erroneous statement, "As I read the indictment the charge is a check-kiting scheme" (App. 10).

The question here is simply whether *United States* v. *Hess*, 124 U.S. 483 (1888); *Ex parte Bain*, 121 U.S. 1 (1887); *Stirone* v. *United States*, 361 U.S. 212 (1960), and *Russell* v. *United States*, 369 U.S. 749 (1962), have any vitality. If they do, certiorari should be granted.

The wisdom of the *Russell* principal is classically demonstrated by this case, in which the defendant was required to go to trial with the chief issue undefined, and in which the vague indictment enabled his conviction to rest on one point, the affirmance of his conviction on another, and the denial of his rehearing on still another. Such an indictment and its inevitably unfair trial cannot support a conviction and a prison sentence.

The vagueness of such an indictment cannot be cured by combing the record in search of sanguine assurances by defense counsel before trial that he knew what the grand jury meant to charge. Here, as always in such naturally unequal contests, defense counsel lost his debate with the prosecutor, before the jury, over what the charge was. When the prejudice exploitable from this vague indictment surfaced for the first time at the trial, and in view of the prejudice on appeal then yet to appear, defense counsel's motion in arrest of judgment (R. 87) did not come too late. *Hagner* v. *United States*, 285 U.S. 427, 433 (1932).

Conclusion

The writ of certiorari should be granted to review the judgment and opinion of The United States Court of Appeals for the Fifth Circuit.

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May 12, 1971

App.

JUDGMENT AND COMMITMENT
(entered March 9, 1970)

UNITED STATES DISTRICT COURT
for the
MIDDLE DISTRICT OF FLORIDA

United States of America
v.
Charles E. Varner
No. 69-47 Orl. Cr.

On this 9th day of March, 1970 came the attorney for the government and the defendant appeared in person and with counsel, Fuller Warren, Verne L. Freeland and Ralph Geilich.

IT IS ADJUDGED that the defendant upon his plea of Not Guilty and a Jury Verdict of Guilty has been convicted of the offense of unlawfully using the United States mail to defraud the Bank of South Brevard, Melbourne, Florida; in violation of Section 1341, Title 18, United States Code, as charged in 5 Counts of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR, or until otherwise discharged as provided by law as to Count 1; ONE (1) YEAR, or until otherwise discharged as provided by law as to Count 2; ONE (1) YEAR, or until

otherwise discharged as provided by law as to Count 3; ONE (1) YEAR, or until otherwise discharged as provided by law as to Count 4; ONE (1) YEAR, or until otherwise discharged as provided by law as to Count 5.

IT IS ADJUDGED that the sentence imposed on each of Counts 2, 3, 4 and 5 shall run concurrent with the sentence imposed on Count 1, and with each other.

IT IS ADJUDGED that commencement of the sentence imposed herein is stayed until Friday, March 20, 1970 at 12:00 o'clock noon.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ George C. Young
United States District Judge

OPINION
(entered January 28, 1971)

UNITED STATES COURT OF APPEALS
for the
FIFTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Charles E. Varner,
Defendant-Appellant.

No. 29513

Before BROWN, Chief Judge, TUTTLE and GODBOLD, Circuit Judges.

PER CURIAM: This is an appeal from a conviction of a former bank director on five counts of an indictment for using the mails to defraud.

The principal contention made on this appeal is that the trial court should not have permitted the case to go to the jury because the indictment so lacked in apprising the defendant of the specific charge and nature of the offense against him and to protect him against double jeopardy as to be void. A secondary objection is the failure of the trial court to grant a motion for a bill of particulars.

The indictment is in five counts. Each of the counts contains the following language:

> "I. Commencing on or about the 7th day of July, 1965, and continuing to on or about the 21st day of December 1965, the defendant,
>
> CHARLES E. VARNER
>
> devised and intended to devise a scheme and artifice to defraud the Bank of South Brevard, Melbourne, Florida, and to obtain money therefrom by means of the following false and fraudulent pretenses and representations well knowing at the time that the pretenses and representations were false when made:
>
> "Charles E. Varner did knowingly and wilfully submit to the Bank of South Brevard, Melbourne, Florida, false and fraudulent bank drafts as deposits to an account maintained by him at said bank entitled Coleman's Airport Village Inn, Account No. 09-0-001-3.

"The defendant, Charles E. Varner, was on the Board of Directors of the bank at the time each bank draft was submitted and on each occasion of the submission of the false and fraudulent drafts the aforementioned bank account was in an overdrawn status. As a result of the submission the aforesaid account was credited with the particular amount and was brought into a current status.

"2. On or about the 7th day of July, 1965, in Brevard County, Florida, in the Middle District of Florida, the defendant,

CHARLES E. VARNER

for the purpose of executing the aforesaid scheme and artifice and attempting to do so, did with unlawful intent cause to be placed in an authorized depository for mail matter a bank draft # 87-777, dated July 7, 1965, drawn on the Hamilton National Bank, Knoxville, Tennessee, made payable to Coleman's Airport Village Inn in the amount of $5,000.00, with the signature of Charles E. Varner thereon, said draft was sent and delivered by the Post Office Establishment of the United States; all in violation of Title 18, United States Code, Section 1341."

Each subsequent counts realleged all of the allegations of the first count of the indictment other than the last paragraph thereof, and then alleged, in substantially the same language, that Varner caused to be placed in an authorized depository a "bank draft" specifically described in a given amount.

The first difficulty faced by the appellant here is that no attack was made on the failure of the indictment to satisfy the required specificity by a motion filed prior to trial, as required by Rule 12(b) (2) and (3) of the Federal Rules

of Criminal Procedure. All objections to the form of indictment were, therefore, waived. (It should be noted that counsel in this appeal was not counsel at the time of the trial.)

Furthermore, we are satisfied that a careful reading of the indictment demonstrates clearly that what, in effect, the grand jury charged was a scheme by Varner to "kite" drafts drawn on distant points, to have them deposited in his account in the bank of which he was an officer, and obtain credit therefor, and that part of the scheme was furthered by the use of the United States mails. Although it may have been much clearer to the casual reader had the indictment included the language to the effect that when Varner deposited these drafts he knew they were worthless and did not intend that they would ever be honored by the drawee, we think this language was not necessary in light of the fact that the indictment referred to them as "false and fraudulent bank drafts as deposits to an account maintained by him." Proof of the falsity and fraudulent nature of the drafts could be supplied by the fact that none of them was ever paid and the jury could infer from the testimony on the trial that Varner knew at the time he made the deposit that they were never expected to be paid.

With respect to the contention that the trial court erred in not requiring a bill of particulars, the answer again is that this point was waived by trial counsel for appellant. Moreover, it appears that no harm was done by such waiver because, by proper motion, appellant's counsel obtained documents that made it clear to him what transactions were actually to be dealt with by the government upon the beginning of the trial.

We have carefully considered the other points raised by appellant, particularly with respect to the question whether

the jury could infer from the evidence given, as to any of the counts, that Varner knew and intended that the mails would be used in the handling of these "false and fraudulent" drafts.

We need not consider whether with respect to each of the five items the proof of mailing was adequate, because the sentences are concurrent sentences and adequacy of the proof with respect to any one of the counts would be sufficient to sustain the judgment of conviction and sentence, making it unnecessary to ascertain whether proof was adequate as to all five. See *Benton v. Maryland*, 395 U.S. 784.

The judgment is AFFIRMED.

BROWN, Chief Judge, concurring specially:

I concur in the decision and all of the opinion except the part that relates to the sufficiency of the indictment as it assumes that F.R. Crim. P. 12(b) (2) was satisfied. Here Appellant is properly faulted, not for the initial failure to meet the precise time table of Rule 12(b) (2) (3),[1] but rather because it was not until the close of the evidence (if then) that the sufficiency of the indictment was challenged.

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[1] "(b) The Motion Raising Defenses and Objections"

* * * *

"(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information * * * may be raised only by motion before trial. The motion shall include all such defenses available to the defendant. Failure to prevent any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver * * * failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

"(3) Time of making motion. The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter."
F.R. Crim. P. 12(b) (2) (3).

Some place between the beginning and the almost end was available to raise the point. The Court has much discretion in allowing a tardy challenge.[2] And under some circumstances it may be determined on appeal that the defect may or should be noticed.[3] But those circumstances are not present here.

But I reject the Court's holding that on a timely, or postponed, permissible attack this indictment would be upheld. Every action charged was an every day business transaction between upright business men. What made this scheme fraudulent by proof was a plan to draw apparently legitimate drafts knowing that each would not be accepted on presentment. And through this "kiting" Varner kept his checking account current. But that was not charged.

With the transactions occurring in states as far off as California the trial itself revealed the impossibility of obtaining during the trial rebuttal witnesses on crucial points. Indeed the record shows that the Government's theory shifted

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[2]See Finn v. United States, 4 Cir., 1958, 256 F.2d 304, and the recapitulation therein of a number of cases in which the sufficiency of the indictment was raised during different stages of the proceedings. See also United States v. Holmes, S.D. Tex., 1953, 110 F. Supp. 233; Wright, *Federal Practice and Procedure*, Criminal § 193.

This is expressed in the "Notes of Advisory Committee on Rules", 18 U.S.C.A. F.R. Crim. P. 12, where it is stated that "Subdivision (b) (3) * * * vests discretionary authority in the court to permit the motion to be made within a reasonable time [after pleading] * * * * [and that] the rule supersedes 18 U.S.C. §§ 3288, 3289, formerly § 566a, fixing a definite limitation of time for pleas in abatement and motions to quash."

[3]The following cases acknowledge that the sufficiency of the indictment "may be noticed by the court at any time during the pendency of the proceeding", Gendron v. United States, 8 Cir., 1961, 295 F.2d 897, and, at whatever point this may happen to be, the court can then determine whether remedial action is necessary: United States v. Manuzak, 3 Cir., 1956, 234 F.2d 421; Walker v. United States, 5 Cir., 1965, 342 F.2d 22, *cert. denied*, 1965, 382 U.S. 940, 86 S.Ct. 117, 15 L.Ed.2d 97; Hotch v. United States, 9 Cir., 1953, 208 F.2d 244.

from time to time and it was not until the jury verdict (or maybe on argument before us) that it jelled.

Granting that the indictment was sufficient to "charge an offense" I think that under the sweep of mail fraud prosecutions a citizen is entitled to be informed why what may be legitimate is not so in fact. *Van Lieu v. United States*, 5 Cir., 1963, 321 F.2d 664; *Russell v. United States*, 1962, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240.

We ought not jeopardize the rights of citizens by encouraging slovenly draftsmanship by the sovereign's exclusive agent for the commencement and maintenance of a prosecution. See *United States v. Cox*, 5 Cir., 1965, 342 F.2d 167 (en banc), *cert. denied*, sub nom., *Cox v. Hauberg*, 1965, 381 U.S. 935, 8 S.Ct. 1767, 14 L.Ed.2d 700; *Luna v. Beto*, 5 Cir., 1968; 395 F.2d 35 (en banc), *cert. denied*, 394 U.S. 966, 89 S.Ct. 1310, 22 L.Ed.2d 568; *Sumrall v. United States*, 5 Cir., 1968, 397 F.2d 924, *cert. denied*, 393 U.S. 991, 89 S.Ct. 467, 21 L.Ed.2d 703.

I therefore concur specially.

OPINION ON PETITION FOR REHEARING
(entered April 12, 1971)

UNITED STATES COURT OF APPEALS
for the
FIFTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Charles E. Varner,
Defendant-Appellant.

No. 29513

Before BROWN, Chief Judge, TUTTLE and GODBOLD, Circuit Judges.

PER CURIAM: The court has carefully considered the petition for rehearing, largely because of the insistence by appellant that the indictment was bad because it charged Varner with having used "bank drafts" for deposit to his account, whereas there was no proof of the deposit of anything other than either "customers' drafts" or simple bank checks. It is the contention of the appellant on this motion for rehearing, that this permitted the government to introduce evidence that was irrelevant to the issue raised by the indictment.

As we stated in the opinion, we conclude that the indictment was not subject to challenge, and, as pointed out by Chief Judge Brown specially concurring, a challenge to the indictment was not timely made.

The petition also complains of this court's determining that counsel's waiver of the right to request a bill of particu-

lars was harmless because "no harm was done by such waiver."

The record here clearly shows that well in advance of the trial the parties both understood the nature of the prosecution to be just as we stated it in our opinion, regardless of the fact that in the indictment the documents that were deposited by Varner, and for which he was given immediate credit and against which he drew, and all of which were ultimately returned, were called "bank drafts." This is true because all the documents were submitted to counsel for Varner, so that there could be absolutely no doubt in the minds of the defendant what documents the government was proceeding on. Moreover, it will appear that during the hearing of one motion, the trial court commented, "As I read the indictment the charge is a check-kiting scheme." To this comment, counsel for appellant said, "Yes, sir."

Furthermore, when we look at the opening statement to the jury made by counsel for the appellant it is perfectly plain that he was aware of the nature of the case that he had to defend. The case came on for trial three months after the comments quoted above. During counsel's opening argument he conceded the correctness or accuracy of all of the documents that were mentioned in the indictment. As to them, he said, "We admit them and stipulate that they are evidence in this case and that they were not honored and that they were returned to the bank so that you will not have to go through the time and effort to admit what is true. The drafts are correct and the drafts were not paid. So it is a bad draft involved and say [sic] there was no intent to defraud . . . ." Counsel further stated, "We will stipulate and agree that the bank accounts of these checks, showing the dates, the debits, credits, withdrawals from sometime in June 1965 through April of 1966 would be chronologically a record of this ac-

count of Mr. Varner's . . . We will show not only there was no scheme to defraud but other than conjecture and speculation — now, more than that the charge against this man is that he deposited these bad drafts or bad checks in his account to bring his account up to date for the purpose of intent to deceive or defraud the Bank of South Brevard . . . and he intended to defraud the bank by means of the scheme of depositing worthless checks or drafts in his account so that he could get his account brought up to cover the bad checks in the account or deficiency so that it wouldn't be in an overdrawn status."

This quotation is intended to make plain the fact that counsel for the defendant himself drew no distinction between "bank drafts" and the actual drafts or checks, which were deposited by Varner and on which he obtained instant credit from the bank of which he was a director. Counsel undertook to base his defense on the fact that the mere depositing of these instruments and the fact that none of them was honored was not sufficient to permit the jury to infer that Varner knew or intended that they would not be honored at the time he deposited them in his account. It is for this reason that we state that the failure of counsel to urge the court to grant a bill of particulars did no harm, because counsel was fully apprised before the trial of precisely what the government's case was all about.

Appellant also strenuously argues that evidence introduced at the trial tending to show that certain bank accounts on which the "drafts" were drawn did not exist. In point of fact, some of the documents purport on their face to be ordinary customers' checks which the jury could believe were drawn on non-existent accounts. With particular reference to the $36,000 document, it purports to be a check signed by "Max Field Enterprises, By Charles E. Varner." The face

of the document bears the statement "For the purpose of obtaining payment of this check I hereby represent that the amount stated herein is on deposit in said bank in my name, subject to this check and is hereby assigned to the payee or holder thereof." Charles E. Varner was named as the payee, and Charles E. Varner purported to sign on behalf of Max Field Enterprises. Testimony is undisputed that there was no account in the Century City Branch of the Bank of America of Los Angeles, California, in the name of Max Field Enterprises, and, in spite of the weakness of Field's testimony, fully commented on by counsel to the jury and by the trial court on motion for judgment notwithstanding the verdict, the only testimony in the record shows that at no time did Max Field operate under the name of Max Field Enterprises, and at no time did Max Field authorize Charles E. Varner to sign any check on his behalf.

As stated, we have carefully considered the petition but find it to be without merit.

The petition for rehearing is DENIED.

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JUDGMENT

(entered January 28, 1971)

UNITED STATES COURT OF APPEALS

for the

FIFTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Charles E. Varner,
Defendant-Appellant.

No. 29513

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 28, 1971

BROWN, Chief Judge, concurring specially:

Issued as Mandate: